

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PANE,	:	
Plaintiff,	:	ORDER
-against-	:	07 Civ. 3216 (LMS)
GREENBURGH, et al.,	:	
Defendants.	:	

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Plaintiff seeks, by letter motion dated August 11, 2008, to amend her Complaint, *nunc pro tunc* to April 18, 2008, when the Court granted an oral motion to amend the Complaint.¹

Newly named Defendant Edward Olsen opposes the motion.² The motion to amend is granted.

First, the Rules of Civil Procedure instruct the Court to "freely permit an amendment" of the pleadings unless the opposing party can show prejudice. Defendant Olsen does not claim prejudice, rather, he claims that the proposed amendment is futile because it fails to allege a cause of action. He argues, in essence, that the allegations that Defendant Olsen took photographs of Plaintiff, against her will, while she was being detained, and then distributed those photographs to other officers who then inquired of Plaintiff about her website and her

¹ Although the Amended Complaint has been filed, see Docket Item 46, this issue has arisen because counsel for newly named Defendants Daniel Massett and Edward Olsen has belatedly interposed an objection to the adequacy of Plaintiff's oral motion on April 18, 2008. See letter of Thomas J. Troetti, Esq., dated August 11, 2008, docketed herewith.

² In the opposition, submitted by letter dated August 15, 2008, Mr. Troetti concedes that newly named Defendant Daniel Massett has no good faith basis to object to the sufficiency of the allegations about him in the Amended Complaint, and Defendant Massett therefore does not join in Edward Olsen's objections.

dominatrix name, cannot state a cause of action. Defendant alleges that "[t]here is not a single case decided in the Second Circuit which provides that the taking of a person's image by use of a camera and/or a video recorder, without such person's consent, rises to the level of a violation of a right secured by the provisions of the United States Constitution and/or any federal statute."

Letter of August 15, 2008, at p. 3. Defendant Olsen's argument in this regard is inaccurate.

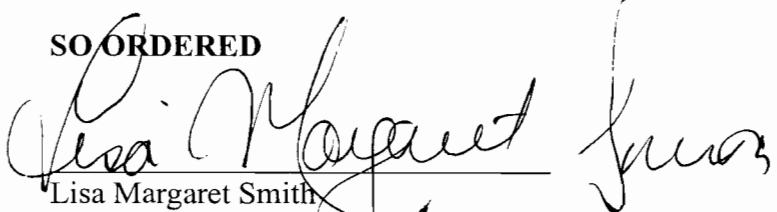
In Caldarola v. County of Westchester, 343 F.3d 570, 574 (2d Cir. 2003), the Second Circuit held that the seizure of a person's image through a recording device during a detention constitutes a seizure under the Fourth Amendment. Id. (finding that the Fourth Amendment was implicated when the plaintiff was videotaped while on the Department of Corrections' grounds). Similarly, in Lauro v. Charles, 219 F.3d 202, 212 (2d Cir. 2000) the Second Circuit found that the Fourth Amendment was implicated when the plaintiff was photographed during a "perp walk" on a private street. Finally, in Warren v. Williams, No. Civ.A. 304 CV537(JCH), 2006 WL 860998, at *18-19 (D. Conn. Mar. 31, 2006) the District Court in Connecticut found that the Fourth Amendment was implicated when the defendants took head-shot photographs of the plaintiffs during a search of a clubhouse. Thus, at the very least, Count One of the Amended Complaint alleging a Fourth Amendment violation, as addressed to Defendant Olsen, states a viable cause of action.

Defendant's opposition to the motion to amend the Complaint, *nunc pro tunc* to April 18, 2008, is denied. The motion to amend the Complaint is granted, *nunc pro tunc* to April 18, 2008.

The Clerk is directed to terminate the Motion identified as Docket Item 46, and to redesignate the document as "Amended Complaint."

Dated: August 15, 2008
White Plains, New York

SO ORDERED


Lisa Margaret Smith
United States Magistrate Judge
Southern District of New York